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No. 93-768

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

This case involves the calculation of withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Under the statutory scheme, a portion of a plan's unfunded vested benefits (i.e., the difference between the present value of the vested benefits and the value of the assets of the plan) are allocated to an employer who ceases participation in the plan. The statute includes detailed rules governing the calculation, allocation, assessment, and payment of withdrawal liability. The statute also prescribes certain procedures for resolving disputes over withdrawal liability, which include mandatory arbitration. *See generally* 29 U.S.C. §§ 1381-1405.

The principal issue litigated below involved the allocation method used by Petitioner, the Milwaukee Brewery Workers' Pension Plan ("Plan"), in determining the amount of the liability incurred by Jos. Schlitz Brewing Company ("Schlitz") upon withdrawal from the Plan.[1] The statute provides that unfunded vested benefits are to be allocated using the so-called "presumptive" method, unless the plan is amended to adopt another permissible method. 29 U.S.C. § 1391(b). In the proceedings below, Petitioner argued that the Plan had been amended to adopt a permissible alternative method—the "direct attribution" method. The practical effect of adopting the direct attribution method would have been to shift approximately $14 million in pension liability from the Miller Brewing Company ("Miller") to Schlitz. The arbitrator, the district court and the court of appeals all agreed, however, that the Plan had not been properly amended, a determination that Petitioner does not challenge in this Court.[2]

Petitioner also argued below that notwithstanding the lack of a plan amendment, Schlitz was under a fiduciary duty to adopt the direct attribution method. This is one of the two issues upon which Petitioner seeks review here. The problem with this issue is that this case has nothing to do with employers who act as fiduciaries or their responsibilities to pension plans. It is only by ignoring or

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[1] In 1982 Schlitz was acquired by Respondent The Stroh Brewing Company ("Stroh"). Schlitz was merged into Stroh, which assumed its liability to the Petitioner. Stroh is a corporation and is wholly-owned by The Stroh Companies, Inc. Stroh has no subsidiaries to list pursuant to Rule 29.1.

[2] The arbitrator determined that the plan agreement, pursuant to its own terms, could only be amended with the consent of all of the parties, including Schlitz, and that Schlitz had never consented to the plan amendment. Pet. App. Ex. E.

Citations are to the Arbitrator's Opinion ("Pet. App. Ex. E at ——"), the arbitration hearing record ("Transcript Vol. —— at ——"), selected hearing exhibits ("Schlitz Trial Ex. ——"), and the opinion of the court of appeals ("Pet. App. Ex. A at ——").

mischaracterizing the relevant facts that Petitioner is able to craft this issue. As noted by the Seventh Circuit, there is "an air of unreality" to it. 3 F.3d at 1001, Pet. App. Ex. A at 11.

A secondary issue in this case was whether Schlitz should have been assessed interest on the amount of its withdrawal liability for the year in which the withdrawal occurred. Although the arbitrator found no such interest liability, the district court disagreed and ordered Schlitz to pay interest for the period in question. The court of appeals reversed the district court on this point, holding that the statute did not contemplate the imposition of such interest.

A. Statement of Facts

1. *Schlitz withdraws from joint bargaining.*

On January 21, 1981, Schlitz gave timely notice of its withdrawal from the Milwaukee Brewers' Association and joint bargaining with the remaining employers in the association. The remaining employers were Miller and the Pabst Brewing Company ("Pabst"). Pet. App. Ex. E at 5, 7; Transcript Vol. I at 39-40; Schlitz Trial Ex. 3.

Brewery Workers' Local Union No. 9 ("Local 9") notified Schlitz, Miller and Pabst on March 20, 1981 of its desire to amend the collective bargaining agreement and the Plan. Pet. App. Ex. E at 8. The collective bargaining agreement provides in relevant part as follows:

> 8. The Milwaukee Brewery Workers' Pension Plan shall be maintained in full force and effect until June 1, 1981. In the event that either party to this contract notifies the other in writing not less than sixty (60) days prior to June 1, 1981, of its desire to terminate or modify such Plan, then the parties shall meet to study and negotiate necessary revisions.

Pet. App. Ex. E at 25; Schlitz Trial Ex. 1 at 25. At approximately the same time, the Plan advised Local 9

and the employers that the presumptive method of determining employer withdrawal liability would apply unless the Plan was amended to provide for another method. Pet. App. Ex. E at 6.[3]

Miller and Pabst, through a negotiating committee, began bargaining with Local 9 on March 25, 1981 with respect to the collective bargaining agreement and the Plan. Schlitz and Local 9 began separate bargaining on April 7, 1981 on the same issues. Pet. App. Ex. E at 8.

During the early negotiations between Miller, Pabst and Local 9, Miller and Pabst recognized that they could not bargain on behalf of Schlitz. As late as May 4, 1981, the chief negotiator for Miller and Pabst stated:

> We can only agree for Pabst and Miller—I cannot speak for Schlitz . . . . We have the obligation of bargaining with you in good faith. You have the right to bargain with us collectively or individually. We are not refusing to sit at the table but we don't have to agree with Schlitz. We are here to get a Contract . . . . I will not speak for Schlitz on the pension plan.

Schlitz Trial Ex. 8 at 26-26B; Transcript Vol. IV at 563-64.

2. *Miller seeks to amend the Plan.*

During the contract negotiations, Miller conducted an analysis of its withdrawal liability under MPPAA and concluded that its own exposure would be reduced if the Plan were amended to adopt the direct attribution method. Miller then sought to convince Pabst that Pabst was better off amending the Plan to provide for the direct attribution

[3] The Plan was managed and administered by a Joint Committee consisting of members appointed by Local 9 and the employers. The members of the Joint Committee were the designated fiduciaries of the Plan. The Joint Committee did not have the power to amend the Plan (Pet. App. Ex. E at 5-6).

method. This presented a problem for Miller because Pabst had already concluded that its liability would increase under the direct attribution method. Transcript Vol. II at 349, Vol. IV at 551, 567, 568-571; Schlitz Trial Ex. 21-24.

Miller retained an actuary and set out to persuade Pabst to adopt the direct attribution method. After several meetings with Pabst, Miller was able to persuade Pabst that amending the Plan would not increase its liability. Miller's actuary had concluded that the only effect of the direct attribution method would be to transfer $14,000,000 of unfunded liability from Miller to Schlitz. An internal Miller memorandum dated May 15, 1981, provides in relevant part:

> The important point is if we have convinced Pabst that they are not better off using the Presumptive Rule. Miller Brewing Company is a giant step closer to having the Plan amended to use the Direct Attribution Rule when calculating the Withdrawal Liability. The difference is approximately $14,000,000.

Direct Attribution Rule			Presumptive Rule		
Miller	28%	$ 31,100,000	Miller	41%	$ 45,500,000
Pabst	35%	38,800,000	Pabst	35%	38,800,000
Schlitz	37%	41,100,000	Schlitz	24%	26,700,000
		$111,000,000			$111,000,000

Transcript Vol. II at 349-51; Schlitz Trial Ex. 24 at 2, 3.

Absent from the discussions between Miller and Pabst and the internal memoranda which detail those discussions is any expression of fiduciary concern for the Plan's beneficiaries.[4] As the court of appeals noted, the record indicates that the bargaining representatives for Miller and

[4] This is not surprising because the selection of a particular method of determining an employer's withdrawal liability does not affect the beneficiaries. The unfunded liability remains the same. The only effect of a change in the methodology is to reallocate the unfunded liability among the participating employers.

Pabst did not act as fiduciaries but negotiated in their own self-interest. 3 F.3d at 1003, Pet. App. A at 14. The focus of that self-interest was the cost of the Plan to them and the allocation of the unfunded liability among Miller, Pabst and Schlitz. Schlitz Trial Ex. 21-24.

On May 20, 1981, Local 9 notified Miller, Pabst and Schlitz of a meeting to be held on May 22, 1981 "for the purpose of negotiating changes in the Milwaukee Brewery Workers' Pension Plan." Schlitz Trial Ex. 12. The purpose of the meeting, according to Local 9, was to jointly negotiate Local 9's proposed amendments to the Plan. Pet. App. Ex. E at 9; Transcript Vol. I at 74-75.

The response of Schlitz to Local 9's demand for joint bargaining was not surprising: Schlitz had properly withdrawn from the Association and joint bargaining. Schlitz did not want to be drawn back into joint bargaining with Miller and Pabst, particularly with respect to the increase in pension benefits sought by Local 9. The response of Schlitz to Local 9 states in relevant part that:

> This [notice of the May 22, 1981 meeting] implies or assumes, unless and until you inform us differently, a joint meeting (and joint bargaining with your Union) on pensions with the other two breweries.
>
> This is to advise that we do not intend to bargain jointly with any other employer. . . .
>
> * * * *
>
> If our understanding of the intention of your letter of May 20 is not correct, and you do not anticipate and are not requesting joint bargaining (by Schlitz, Pabst and Miller) on pensions, please so inform us in writing.
>
> In such event, we will be pleased to meet with you on pensions and discuss our proposals and your proposals on the subject separately; or we will continue to meet on this subject matter together with the other subjects, as we have over the past several weeks.

Schlitz Trial Ex. 15; Transcript Vol. II at 159-60.

Local 9 did not respond to this letter or otherwise indicate that the May 22, 1981 meeting was to be anything but a joint negotiating session with Miller, Pabst and Schlitz on Local 9's pension proposal. Local 9's pension proposal, at least with respect to the proposal made to Schlitz, did not include an amendment to provide for another method of determining withdrawal liability. Schlitz, which did not want to be drawn into joint bargaining and which was unaware that the issue of withdrawal liability was even on the agenda, did not attend the meeting. Transcript Vol. I at 74-77, 80-81; Transcript Vol. II at 159-62, 296-97.[5]

Miller, Pabst and Local 9 met on May 22, 1981 and agreed to an amendment to the Plan adopting the direct attribution method of determining employer withdrawal liability. The form of the amendment, however, failed to comply with the technical requirements of MPPAA. *See* 29 C.F.R. §§ 2642.7, 2642.11. Local 9, Miller and Pabst met again on May 29, 1981 and corrected the deficiencies in the initial amendment. Schlitz was not invited to and received no notice of this meeting. Pet. App. Ex. E at 9; Transcript Vol. II at 303, Vol. III at 464, Vol. IV at 582-83.

Although Schlitz and Local 9 continued to bargain separately with respect to all issues, including Plan amendments, no amendment on the subject of withdrawal liability was ever proposed to Schlitz by Local 9.[6] The existing collective bargaining agreement between Schlitz and Local 9 expired on May 31, 1981. Local 9 went out on

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[5] Upon timely withdrawal from multiemployer bargaining, Schlitz had the right to bargain separately with Local 9 and Local 9 had the obligation to bargain separately with Schlitz on all mandatory subjects of bargaining. *Retail Associates, Inc.*, 120 N.L.R.B. 388, 393-95 (1958), *cited with approval in Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 410-11 (1982).

[6] Petitioner's contention that Schlitz "unilaterally imposed upon the Plan the method which is in its own best interest" (Pet. at i) is thus a mischaracterization of the record below.

strike and Schlitz and Local 9 negotiated to impasse. Pet. App. Ex. E at 9-10; Transcript Vol. I at 85-87, 311, Vol. II to 311.

3. *Schlitz withdraws from the Plan.*

On July 31, 1981, Schlitz announced that it was permanently closing its Milwaukee plant. On August 14, 1981, the Schlitz representative on the Joint Committee gave notice of his resignation. Pet. App. Ex. E at 8; Transcript Vol. V at 605.

On August 17, 1981, the Joint Committee directed the Plan's actuary to calculate the withdrawal liability of Schlitz based on the amendment agreed upon by Miller, Pabst and Local 9. The Joint Committee did not perform any investigation to determine whether the Plan could be amended without the agreement of Schlitz. Pet. App. Ex. E at 9; Transcript Vol. II at 252-53, 352.

The Plan presented its demand for withdrawal liability and a payment schedule to Schlitz in a letter dated September 29, 1981. The Plan calculated the liability of Schlitz using the direct attribution method and demanded $41,031,046. In calculating the payment schedule, the Plan added interest to that liability for the period from December 31, 1980 to December 31, 1981. Schlitz made its first payment to the Plan on October 29, 1981. Pet. App. Ex. E at 9-10, 39.

B. The Decisions Below

1. *The arbitrator.*

The parties proceeded to arbitration on a number of issues, many of which are not relevant here. Hearings were held in 1987, and the arbitrator issued an Opinion and Award in July 1988.

The arbitrator concluded that the Plan had not been amended to adopt the direct attribution method. The

Plan, by its terms, could be amended only upon the assent of each of the employers and the union. In the absence of agreement by Schlitz, therefore, there could be no amendment. Pet. App. Ex. E at 18-19. The arbitrator also rejected the Plan's argument that Schlitz was under a fiduciary obligation to agree to the proposed plan amendment adopting the direct attribution method. *Id.* at 25-28. Finally, the arbitrator concluded that the imposition of interest for the year of withdrawal is "not in accordance with MPPAA" and accordingly such interest was disallowed. *Id.* at 40.

2. *The district court.*

Schlitz sought confirmation of the arbitrator's award in the district court, and the Plan counterclaimed seeking to have the award vacated or modified. Following briefing by the parties, the district court issued its Decision and Order on June 6, 1991.

The district court agreed that the Plan could be amended only by the unanimous consent of the employers and the union. Slip op. at 14-16.[7] It further agreed that "employers do not act as fiduciaries when they amend a plan," *id.* at 20, rejecting all of the Plan's arguments to the contrary. *Id.* at 23-31. The court disagreed with the arbitrator, however, on the question of whether interest was properly assessed for the withdrawal year and vacated that portion of the arbitrator's award. *Id.* at 33-39.

3. *The court of appeals.*

Both parties appealed to the United States Court of Appeals for the Seventh Circuit, and the court issued its opinion on August 13, 1993.

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[7] The district court's opinion was not reproduced in the Petitioner's Appendix. We have lodged copies of this opinion with the Clerk.

The court of appeals affirmed the district court insofar as the district court held that the Plan had not been amended and that no fiduciary duty attached to the decision of whether to adopt an amendment. 3 F.3d at 1001-03, Pet. App. Ex. A at 11-15. However, it disagreed with the district court's award of interest for the withdrawal year. *Id.* 1003-04, Pet. App. Ex. A at 15-18. Thus, the court of appeals directed the district court to enforce the arbitrator's award in its entirety. *Id.* at 1004, Pet. App. Ex. A at 18.

On November 12, 1993, the Plan filed its Petition for Writ of Certiorari. By letter application to the Clerk of the Court, Schlitz sought and obtained a 10-day extension of time within which to file a Brief in Opposition, through and including December 23, 1993.

REASONS FOR DENYING THE WRIT

Petitioner alleges a conflict among the circuits on the issue of liability for interest during the year of withdrawal. However, an analysis of the facts of these cases, including the most recent decisions, reveals that the asserted conflict may not exist. The issue is also not sufficiently important to justify a grant of certiorari.

The second issue raised for review involves the entirely separate matter of the method used in calculating the withdrawal liability of Schlitz. The unanimous conclusion of the arbitrator and lower courts on this issue reflects the *unique* factual circumstances presented in this case. Moreover, the only legal issue raised by Petitioner in this regard is one on which there is no conflict among the circuits. Therefore, even if the Court should grant certiorari on the first question presented, there is no reason for the Court to consider the second question.

I. THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST UNDER MPPAA IS NOT A QUESTION THAT WARRANTS CONSIDERATION BY THIS COURT ON CERTIORARI

The Petitioner argues that the courts of appeals are in "intolerable" conflict on the issue of whether interest may be assessed for the year in which withdrawal occurs. Pet. at 11. If there is a conflict on this issue, it is hardly intolerable. The Seventh Circuit has questioned whether there is any conflict at all. But even assuming disagreement between the circuits at some level of analysis, the manner of calculation of withdrawal year interest under MPPAA is of far less importance than Petitioner asserts and does not warrant a grant of certiorari.

This issue is considerably more complex than Petitioner's treatment of it would indicate. Referred to by the lower courts as "gap," "pre-withdrawal," "pre-demand" or "first year" interest, it is not simply a question of whether interest may be assessed for an entire year, a "yes" or "no" proposition. As the court of appeals explained, the statute mandates that withdrawal liability is to be measured as of the end of the plan year preceding the withdrawal ("calculation date"). 29 U.S.C. § 1391(c)(2)(C)(i). The amortization schedule is calculated as if the first payment were made at the beginning of the plan year following the withdrawal ("presumptive first payment date"). 29 U.S.C. § 1399(c)(1)(A)(i); *see* 3 F.3d at 1003-04, Pet. App. Ex. A at 16. *Actual* payments may begin *during* the year in which the withdrawal occurred, as was the case here.[8] The "withdrawal year"—the period between the calculation date and the presumptive first

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[8] MPPAA specifies that payments must begin no later than 60 days after the plan makes a demand for withdrawal liability. 29 U.S.C. § 1399(c)(2). Thus, if an employer withdraws relatively early in the year and the plan presents its demand promptly thereafter, actual payments will commence before the presumptive first payment date.

payment date—has been subdivided for purposes of analysis into several discrete periods, including

- the period between the calculation date and the date of withdrawal;
- the period between the date of withdrawal and the date payments actually begin;
- the period between the date of withdrawal and the presumptive first payment date;
- the period between the date payments actually begin and the presumptive first payment date.

Because the propriety of including interest for these various periods may or may not be presented by the facts of a particular case, a meaningful evaluation of a potential conflict between the views of the courts of appeals requires an analysis of the particular facts of each case.

In *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), the plan sought interest from the calculation date to the date on which the plan made a demand, more than three years later.[9] The arbitrator denied interest for the entire period. The district court vacated the arbitrator's award and allowed interest from the date of withdrawal to the date the plan made demand for payment. The Third Circuit modified the district court's order only in part: "We will modify the district court's calculation of pre-demand interest to provide only first-year interest." 916 F.2d at 110. The only portion of first-year interest calculated by the district court was from the date of withdrawal to the presumptive first payment date. Although far from clear, this suggests that *Huber* only provides for interest from the date of withdrawal. This apparent holding raises questions because the rationale of

[9] The *Huber* plan filed a petition for a writ of certiorari, which petition was ultimately dismissed pursuant to Rule 46. *See* 113 S. Ct. 1070 (1993). The petition did not seek review of the withdrawal year interest issue. 59 U.S.L.W. 3571 (1991).

the court's decision suggests that interest should be allowed from the calculation date. Further confusion is created by the court's apparent inconsistent use of the terms "first-year interest" and "pre-demand interest." *See* 916 F.2d at 95, 110.

The only reported decision in the Third Circuit to apply *Huber* interpreted it to allow interest from the date of withdrawal *not* the calculation date:

> Pursuant to a separate and distinct holding in *Huber, supra,* under these facts the Fund is necessarily entitled to interest payments for the first year, that is from the date of the withdrawal liability until the statutorily assumed first payment date, that being the "first day of the plan year following the plan year in which the withdrawal occurs."

Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters Fund, 16 Employee Benefits Cas. (BNA) 2100, 2104 (W.D. Pa. 1993) (quoting 29 U.S.C. § 1399(c)(1)(A)(i)). The Third Circuit affirmed the district court's decision without an opinion. *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund,* 1993 U.S. App. LEXIS 26,924 (3d Cir. Sept. 21, 1993). Thus, contrary to Petitioner's assertion (Pet. at 14), it is not clear that *Huber* provides for the running of interest from the calculation date.

The facts of the Fourth Circuit's case dealing with withdrawal year interest render it reconcilable with *Huber*, as applied in *Colteryahn*. In *Borden, Inc. v. Bakery & Confectionery Union & Industry Int'l Pension,* 974 F.2d 528 (4th Cir. 1992), withdrawal occurred on the last day of the plan year, i.e., the day before the presumptive first payment date. The plan assessed interest for the withdrawal year—effectively, from the calculation date to the date of withdrawal—and the district court affirmed. The Fourth Circuit reversed. 974 F.2d at 536. The assessment of withdrawal year interest under those

facts would have resulted in the imposition of interest for the period *before* the withdrawal.

In the opinion below, the Seventh Circuit joined the Fourth Circuit in *Borden* by concluding that MPPAA does not authorize the assesment of interest before the date of withdrawal (i.e., before an employer's obligation to pay arises). 3 F.3d at 1004, Pet. Ex. A at 17. In joining the Fourth Circuit, the Seventh Circuit recognized the ambiguity found in *Huber* and sought to reconcile its decision with that of *Huber*:

> To the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the . . . calculation date and the date of actual withdrawal, we disapprove that decision. (*Whether Huber actually holds any such a thing is doubtful.*)

Id., Pet. App. Ex. A at 18 (emphasis added).

The rationale of the Seventh Circuit on this issue is persuasive. Although MPPAA authorizes the assessment of interest in a number of instances, 29 U.S.C. § 1399 (c)(3), (4), (5), it does not authorize interest *prior* to the time the employer's withdrawal liability arises. Under MPPAA's withdrawal liability scheme, an employer's withdrawal liability is *calculated* based upon "the plan's unfunded vested benefits as of the end of the plan year preceding the plan year in which the employer withdraws . . . ." 29 U.S.C. § 1391(c)(1)(C)(i). However, the establishment of a calculation date has nothing to do with the assessment of interest. An employer's withdrawal liability under MPPAA *does not arise* until sixty (60) days after receipt of written demand from the plan. 29 U.S.C. § 1399(c)(2). As the Seventh Circuit correctly held, "Schlitz was not liable for a penny until it withdrew from the Plan and received a notice of liability" and "MPPAA does not authorize the assessment of interest before an employer's obligation to pay arises."

3 F.3d at 1004, Pet. App. Ex. A at 17. Contrary to the Plan's contention, the word "amortize" in 29 U.S.C. § 1399(c)(1)(A)(i) does not support the assessment of pre-withdrawal interest. There is no principle of amortization that calls for a party to pay interest on a debt before the debt is incurred. It makes no economic sense to assess interest against a withdrawing employer until after it ceases to contribute to the Plan and its obligation to make withdrawal liability payments arises.

The courts of appeals appear to be moving towards a consistent interpretation of MPPAA with respect to this issue. Although the cases may contain apparently inconsistent language, they are not in such clear conflict as to warrant a resolution of the issue by this Court. It remains to be seen whether an "intolerable" conflict will arise. Only a few courts have had an opportunity to address the issue. The Petition should be denied to allow further development and clarification of the issue by the lower courts.

In any event, the issue has arisen in only a handful of cases since the enactment of MPPAA in 1980. It is insignificant when compared with the other actuarial issues (i.e., the interest rate assumption used for the present value calculations and the retirement age assumption) which dominate these cases. There is no reason to believe that in any of these cases the employer would have proceeded to arbitration on the withdrawal year interest issue alone.

Petitioner posits that, in the absence of action by this Court, races to the courthouse and costly litigation will ensue. Pet. at 14. The sparsity of reported cases and the monetary insignificance of the issue suggest otherwise. Plans and their actuaries have been calculating the withdrawal liability of employers under MPPAA for well over a decade. There is every reason to believe that plans and withdrawing employers will continue to resolve this and

the other actuarial issues short of litigation. It is only when they are unable to resolve the more significant actuarial issues that litigation ensues.

Petitioner also overstates the monetary stakes. The amount of withdrawal liability originally assessed in this case (over $41 million) was unusually large and thus the amount of interest assessed was also substantial (over $2.8 million). The amount of withdrawal liability involved in the other reported cases is generally substantially less. *See, e.g., Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993) (withdrawal liability of $268,168.81 assessed); *Borden, Inc. v. Bakery & Confectionery Union & Industry Pension*, 974 F.2d 528 (4th Cir. 1992) (withdrawal liability of $757,803 assessed by the plan; $102,461 allowed by the court). Thus, the amount of withdrawal year interest in some cases will be even more modest and likely to be resolved by agreement of the parties.

In summary, certiorari is not warranted to review the withdrawal year interest issue, either by an "intolerable" conflict between the circuits or by the importance of the issue.

II. THE DISPUTE CONCERNING THE APPROPRIATE ALLOCATION METHOD FOR CALCULATING THE WITHDRAWAL LIABILITY OF SCHLITZ WAS CORRECTLY DECIDED BY THE COURT OF APPEALS BASED ON THE UNIQUE FACTS OF THIS CASE AND GOVERNING LAW

Petitioner contends that the court of appeals erred in holding that Schlitz was not required to act as a fiduciary when bargaining over a proposed amendment to change the method of calculating an employer's withdrawal liability. Petitioner is wrong. The court of appeals' conclusion is correct and consistent with every other circuit to consider the issue. When bargaining with unions over the terms of pension plans, employers are expected to act

in their own financial interest and not as fiduciaries for the plan beneficiaries. There is no reason for this Court to grant certiorari to decide this issue.

Moreover, Petitioner's fiduciary issue is not fairly presented in this case because of the unique factual setting. The arbitrator and courts below found that the plan was never amended because Schlitz never received effective notice or an opportunity to vote, and Petitioner does not raise any challenge to these findings in this Court.

Petitioner has raised what the court of appeals characterized as a "fallback" position:

> The Plan has a fallback position, with several steps. (1) When selecting a method of withdrawal liability, all three employers acted as fiduciaries to the Plan. (2) A fiduciary acting in May 1981 would have been required to prefer the direct attribution method to the presumptive method. (3) Had Schlitz attended the meetings in May 1981 it would have voted for the direct attribution method even though that disserved its own interests (and had Schlitz violated its fiduciary responsibility, a court would have intervened). (4) Because the direct attribution method *would* have been adopted by unanimous consent had Schlitz fulfilled its responsibilities, the arbitrator should have treated the Plan *as if* it had been amended.
>
> There is a certain logic to this, but also an air of unreality. . . .

3 F.3d at 1001, Pet. App. Ex. A at 11.

Although the court of appeals rejected the initial premise that the employer was required to act as a fiduciary, it also evinced considerable skepticism with regard to the other points in this chain of reasoning, based upon the factual circumstances of this case.[10] The decision below

[10] Contrary to the Plan's characterization of the facts, none of the employers (including Miller and Pabst) acted like fiduciaries

is thus bound up with the unique facts of this case, and certiorari should not be granted.

A. The Court of Appeals Correctly Held that Schlitz Would Not Have Been Required to Act as a Fiduciary if it Had Been Given the Opportunity to Vote on the Proposed Plan Amendment

The authority for Petitioner's expanded concept of fiduciary responsibility remains a mystery. Matters relating to pension plans have long been held to be mandatory subjects for collective bargaining. *See, e.g., Inland Steel Co.*, 77 N.L.R.B. 1, 7 (1948), *enforced*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *see also NLRB v. Amax Coal Co.*, 453 U.S. 322, 336 (1981) (noting that pension agreements are "the product of bargaining between the representatives of the employees and those of the employer").

An employer does not become a fiduciary merely because it is negotiating the terms of a pension plan. *United Independent Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1262, 1268 (7th Cir. 1985); *Sutton v. Weirton Steel Division*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984). The lower courts have consistently concluded that establishing the terms of an ERISA-covered benefit plan is not a fiduciary function. *E.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990); *Musto v. American General Corp.*, 861 F.2d 897, 911-13 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432-33 (9th Cir. 1986); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Amato v. Western Union Int'l,*

(they were bargaining in their own self-interest). Schlitz was not obligated to attend the meetings in May 1981 (Local 9's notice was inadequate and Schlitz was engaged in separate bargaining). Schlitz did not vote against the plan amendment (the plan amendment was never proposed to Schlitz by Local 9).

Inc., 773 F.2d 1402, 1426-27 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *United Air Lines*, 756 F.2d at 1268; *Sutton*, 724 F.2d at 410-11.[11]

The authority upon which Petitioner relies in support of its contrary argument is inapposite. Thus, the legislative history cited by Petitioner (Pet. at 26) refers to MPPAA's *de minimis* exception and certain abatement rules which have nothing to do with the selection of an alternative method of calculating withdrawal liability. The *de minimis* exception and abatement rules "eliminate or reduce" the liability of a single employer due to the unique circumstances surrounding its withdrawal.

Under the *de minimis* exception, part or all of an employer's liability may be forgiven. 29 U.S.C. § 1389. The abatement rules permit an employer to withdraw from a plan with unfunded vested benefits without incurring any withdrawal liability. 29 U.S.C. §§ 1384, 1386. These rules permit a plan to collect less than the entire amount of withdrawal liability the plan could demand under other applicable provisions of MPPAA. Because it would appear to be a clear violation of a fiduciary duty to collect less than the full amount of withdrawal liability an employer

[11] Petitioner nevertheless insists that plan amendments that "impact vested benefits" give rise to fiduciary duties. Pet. at 23. However, even if the allocation method did "impact" vested benefits in the sense of affecting plan funding (which it does not), it would not give rise to a fiduciary responsibility. Employers bargain with respect to a number of issues that might be said to "impact" vested benefits in this sense. For example, the level of contributions directly impacts the funding level of vested benefits, yet is routinely the subject of collective bargaining. *Professional Administrators, Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 644 (6th Cir. 1987); *Malden Mills Indus., Inc. v. ILGWU Nat'l Retirement Fund*, 766 F. Supp. 1202, 1209 (D. Mass. 1991). As long as the parties comply with the minimum funding requirements of ERISA, 29 U.S.C. § 1082; I.R.C. § 412, they are free to negotiate any level of contributions. Likewise, the parties should be free to negotiate a method of withdrawal liability as long as the method chosen is permitted by MPPAA.

owes, the legislative history cited by the Plan explains that a plan's choice of rules forgiving all or part of an employer's withdrawal liability is not a *per se* violation of fiduciary standards. The cited legislative history is taken out of context and does not support the contention urged by the Petitioner.

The cases cited by the Petitioner are equally unavailing. None of them addresses, much less holds, that parties become fiduciaries by negotiating plan amendments which adopt a particular method of allocating employer withdrawal liability.[12] Indeed, the cases cited by the Plan assume that the trustees of a plan were given the authority to amend the pension agreement. The cases do not address the situation where the authority to amend the pension agreement remains in the hands of the collective bargaining parties.

B. If Schlitz Had Acted as a Fiduciary, it Would Not Have Been Required to Vote in Favor of the Amendment Proposed by Miller

The second step of Petitioner's fallback argument is unpersuasive and turns on the particular facts of this case as well. This step assumes that the Plan's beneficiaries would have been better off had the Plan been amended to adopt the direct attribution method. However, the facts are otherwise in this case.

There is no credible evidence, and the arbitrator made no finding, that the selection of a particular allocation method adversely affected the Plan's beneficiaries. Had

[12] In particular, Petitioner mischaracterizes the Court's recent opinion in *Concrete Pipe*. *See* Pet. at 20, 27. *Concrete Pipe* dealt with certain statutory presumptions that come into play in resolving disputes over withdrawal liability. 29 U.S.C. § 1401(a)(3). One of those presumptions goes to the reasonableness of *actuarial* methods and assumptions employed to calculate the plan's unfunded vested benefits. 29 U.S.C. §§ 1393; 1401(a)(3)(B). The method used to allocate the plan's underfunding among the participating employers was not at issue.

the Plan been amended, the only effect would have been the transfer of $14 million in liability for unfunded vested benefits from Miller to Schlitz. As the courts below noted, the choice of a particular allocation method does not affect the total unfunded liability of the plan; it merely redistributes the responsibility for that liability among the participating employers. 3 F.3d at 1002, Pet. App. Ex. A at 14 ("Each method produces a total of $111 million in withdrawal liability; only the allocation among employers is at issue."); slip op. at 27 ("[T]he different methods of calculation merely shift responsibility for unfunded vested benefits among the Employers.").

Petitioner argues that the allocation of liability among the employers might affect collectibility. Pet. at 21-22. This scenario is entirely speculative, however. The bargaining parties, at the time they agreed on a plan amendment, could not be expected to know whether any of the employers would withdraw from the plan, the order in which they might withdraw, or the relative financial strength of the withdrawing and remaining employers. It is unrealistic to expect that the bargaining parties possess this kind of foresight.

C. The Arbitrator Did Not Have the Authority to Treat the Plan as if it Had Been Amended

Finally, Petitioner argues that the Plan should be deemed amended, presumably by operation of law. Even assuming that amending the Plan was a fiduciary function and that adopting the direct attribution method was in the best interest of the Plan, the argument fails. If the other parties were convinced of the need for such an amendment, they should have given Schlitz proper notice and sought its agreement. Had Schlitz refused, the parties could have pursued their remedies in the courts. Having failed to take these steps, however, Petitioner is not entitled to have the Plan reformed.

Petitioner argues that even in the absence of a plan amendment MPPAA mandates the adoption of the direct

attribution method in this case. This argument is precluded by the statutory scheme. MPPAA provides that the presumptive method shall apply unless the Plan is amended to provide for one of a number of other permissible methods. 29 U.S.C. § 1391(b). Authorization for the selection of other methods is found in subsection (c)(1), which reads in relevant part as follows:

> A multiemployer plan . . . *may be amended* to provide that the amount of unfunded vested benefits allocable to an employer that withdraws from the plan is an amount determined under paragraph (2), (3), (4), or (5) of this subsection, rather than under subsection (b) or (d) . . . .

29 U.S.C. § 1391(c)(1) (emphasis added.)

The statute does not read "shall be amended." The statutory alternatives are thus permissive not mandatory. The statutorily preferred method under MPPAA is the presumptive method. The aribtrator had no choice in the matter. In the absence of a plan amendment, MPPAA mandates the application of the presumptive method.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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